

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN H. DAVIS	:	DETERMINATION DTA NO. 820262
for Revision of a Determination or for Refund of Cigarette Tax under Article 20 of the Tax Law for the Period August 1, 2003.	:	

Petitioner, John H. Davis, 344 Fulton Street, Babylon, New York 11704-2130, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period August 1, 2003.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on September 28, 2005 at 10:30 A.M., with all briefs to be submitted by February 13, 2006, which date began the six-month period for the issuance of this determination. Petitioner appeared by Harry H. Kutner, Jr., Esq. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Michelle Helm, Esq., of counsel).

ISSUE

Whether penalty was properly imposed against petitioner for the possession or control of unstamped cigarettes which he had purchased at a smoke shop located on a Long Island Indian reservation.

FINDINGS OF FACT

1. Jose A. Febo, an investigator with the New York State Police (“State Police”), has considerable experience with the contraband cigarette trade especially in his current assignment to a Special Investigations Unit of the State Police based in Riverhead on the eastern end of Long Island. Based on his training and experience, Investigator Febo was aware that there are no licensed agents of cigarettes on Indian reservations. Based upon Indian sovereignty, cigarettes are sold tax-free and therefore, in the investigator’s words, are going to be “unstamped or contraband, if they are removed from the reservation . . . and consumed off the reservation by non-native [American] persons.”

2. In October of 2002, the investigator first observed petitioner at Monique’s Smoke Shop located on the Pospatuck Indian Reservation (“Indian reservation”) near Mastic (Suffolk County) on Long Island loading half cases of cigarettes into the trunk of his maroon-colored 1996 Jaguar. Investigator Febo knew from his training and experience “that Monique’s has at times sold in excess of . . . the two cartons¹ [of untaxed cigarettes] that most persons are presumed allowed to carry with them for their personal consumption.” He proceeded, in his unmarked police car, to follow petitioner but broke off his surveillance given his inability to obtain additional police support. Subsequently, he conducted “a few light surveillances of [petitioner’s] residence” which did not result in any further action taken against petitioner.

3. Less than a year later, on August 1, 2003, Investigator Febo was in the vicinity of Monique’s Smoke Shop and observed petitioner with his vehicle parked in front of the smoke shop “reviewing what appeared to be a lengthy receipt in his hand.” Based upon his prior

¹ Pursuant to Tax Law § 471-a, use tax on cigarettes is *not* due “on the use of four hundred or less cigarettes” (which equals two cartons or less based upon 200 cigarettes in a carton since there are 20 cigarettes in a pack of cigarettes and 10 packs of cigarettes in a carton).

observation and experience, he followed, once again in his unmarked police vehicle, after petitioner exited the Indian reservation.

4. As he followed petitioner, the investigator witnessed petitioner driving “somewhat erratically,” including speeding, as well as other violations of the New York Vehicle and Traffic Law, including driving without a seat belt on and operating on the highway with his turn signal on for long periods of time. The investigator radioed for a marked New York State Trooper patrol car to pull petitioner over, and the investigator approached petitioner’s stopped car along with the uniformed trooper after having followed petitioner for about 50 minutes.

5. The investigator observed numerous cartons of cigarettes in what he referred to as “bodega bags, which is a small black bag that you get in the deli, grocery” in New York City or “out east” on Long Island, as well as three loose packs of Salem-brand cigarettes in plain view on the front seat of the vehicle. Investigator Febo observed that one pack was open but the remaining two closed packs “had no New York State tax stamp affixed.”

6. When he was asked by the investigator where he was coming from and where the cigarettes had come from, petitioner lied. Mr. Davis answered “fifty” when the investigator asked petitioner how many cartons of cigarettes he had. When asked “if he minded if I took a look in the car,” petitioner consented to the investigator’s search despite the investigator’s belief that he “didn’t need his consent” based upon his “reasonable cause to believe that these cigarettes . . . were clear-cut contraband, and pursuant to the automobile exception, the cigarettes, in fact, were seizable.” Upon opening the trunk of the vehicle, the investigator found additional cartons of untaxed cigarettes.

7. The search of petitioner’s vehicle yielded 108.1 cartons (or 1,081 packs of cigarettes of untaxed cigarettes.

8. The investigator arrested petitioner and seized the untaxed cigarettes. Petitioner was charged with a felony under Tax Law § 1814(e)(1) for possession for the purpose of sale of more than 20,000 untaxed/unstamped cigarettes.

9. The Division of Taxation (“Division”) issued a Notice of Determination dated January 9, 2004 against petitioner asserting penalty due of \$15,465.00 under section 481(b)(1) of Article 20 of the Tax Law for the tax period ended August 1, 2003. Penalty asserted due was computed by multiplying \$150.00 by 103.1 cartons,² which equals \$15,465.00.

SUMMARY OF THE PARTIES’ POSITIONS

10. The Division maintains that the only issue is a simple one: whether or not petitioner “was in possession or had control of unstamped cigarettes.” According to the Division, based on the testimony of the investigators, the State has shown that petitioner had possession or control of untaxed cigarettes as well as the specific quantity that was seized. The Division contends that Investigator Febo’s search of petitioner’s vehicle was lawful, and that petitioner has not met his burden to prove that the notice issued against him for penalty was erroneous or improper.

11. Petitioner argues that the unstamped cigarettes were seized less than an hour after he purchased them and the penalty is erroneous because cigarette tax was not due until 24 hours after purchase. He also claims that “cigarettes sold by an exempt entity, here a native American tribe, exempt the purchaser as well” pursuant to a theory he labels “transferred immunity.” Finally, petitioner asserts that the unstamped cigarettes were “the product of an unlawful search”

² As detailed in the Conclusions of Law, under Tax Law § 481(b)(i), penalty of not more than \$150.00 for each two hundred cigarettes, or fraction thereof, may be imposed on unstamped packages “in excess of one thousand cigarettes” in the possession of any person. Since there are 10 packages or 200 cigarettes (20 cigarettes in a package multiplied by 10 equals 200 cigarettes) in one carton, in calculating the penalty the Division subtracted five cartons of cigarettes, equaling 1,000 cigarettes, from the total unstamped cigarettes in petitioner’s possession of 108.1 cartons.

and “may not be the basis for a tax nor a penalty.” Rather, petitioner maintains that the Division did not shoulder “the heavy burden it bore to establish an exception to the need for a warrant.”

CONCLUSIONS OF LAW

A. Cigarette tax is imposed under Tax Law § 471(1) which provides as follows:

There is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale, except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax Such tax on cigarettes shall be at the rate of seventy-five cents for each ten cigarettes or fraction thereof Such tax is intended to be imposed upon only one sale of the same package of cigarettes. It shall be presumed that all cigarettes within the state are subject to tax until the contrary is established, and *the burden of proof that any cigarettes are not taxable hereunder shall be upon the person in possession thereof.* (Emphasis added.)

B. In order to discourage the sale of untaxed cigarettes, Tax Law § 481(b)(i) provides for the imposition of penalty, in relevant part, as follows:

In addition to any other penalty imposed by this article, the commissioner may impose a penalty of not more than one hundred fifty dollars³ for each two hundred cigarettes, or fraction thereof, in excess of one thousand cigarettes in unstamped or unlawfully stamped packages in the possession or under the control of any person.

C. In the first instance, petitioner does not deny that he was in possession or control of the 108.1 cartons of assorted cigarettes all lacking New York State cigarette tax stamps as detailed in Finding of Fact “7”. Further, the credible and thorough testimony of the two investigators as well as the records they created in carrying out their professional duties were persuasive evidence of the events at issue. Such evidence supports the conclusion that the Notice of Determination dated January 9, 2004 asserting penalty due of \$15,465.00 under Tax Law § 481(b)(i) was not erroneously issued against petitioner. As noted in footnote “2”, the

³ In 2000, penalty was increased from \$100.00 to the current penalty of \$150.00 per 200 hundred cigarettes based upon a legislative finding that “existing penalties for cigarette bootlegging are inadequate” (L 2000, ch 262, § 7).

Division correctly subtracted five cartons of cigarettes, equaling 1,000 cigarettes, in computing the penalty which may be imposed on unstamped packages “in excess of one thousand cigarettes.”

D. Petitioner has not shouldered his burden of proof under Tax Law 471(1), as detailed above, to establish that the unstamped cigarettes in his possession were not subject to cigarette tax. His contention that cigarettes sold by “a native American tribe, exempt the purchaser as well” pursuant to a theory he described as “transferred immunity” is meritless (*see, New York Association of Convenience Stores v. Urbach*, 181 Misc 2d 589, 694 NYS2d 885). The political decision by the State to cease its attempts to “enforce the collection of tobacco product and motor fuel excise and sales taxes connected to sales of such commodities by Indian retailer to non-Indian consumers,” based upon its fears of violence and public unrest, does not serve to convey some sort of “transferred immunity” to non-Indian consumers such as petitioner (*New York Association of Convenience Stores v. Urbach, supra* at 592). Rather, petitioner remains liable for cigarette tax since pursuant to Tax Law § 471(1) it “shall be presumed” that they are subject to tax since he has not shouldered, as the person in possession of such cigarettes, “the burden of proof” to establish “the contrary.”

E. Petitioner’s contention that he cannot be held liable for penalty since use tax on cigarettes was not due until 24 hours after purchase and the unstamped cigarettes were seized approximately one hour after he purchased them on the Indian reservation, is also without merit. Petitioner is correct that use tax on cigarettes is due “[w]ithin twenty-four hours after liability for the tax accrues” pursuant to Tax Law § 471-a. However, petitioner has not met his burden of proving that he intended to make payment of use tax on the cigarettes in his possession. He offered no testimony or any other evidence on this point. Moreover, given the 108.1 cartons of

unstamped cigarettes in his possession, he was without authority to take advantage of this provision permitting the payment of use tax within 24 hours. Under Tax Law § 1814(f), since petitioner had in his possession more than 25 cartons of unstamped cigarettes, this 24-hour provision is inapplicable. Tax Law § 1814(f) provides as follows:

[T]he possession or transportation within this state by any person, other than an agent at any one time of 5,000 or more cigarettes (25 cartons) in unstamped . . . packages shall be presumptive evidence that such cigarettes are possessed or transported for the purposes of sale and are subject to the tax imposed by section 471 With respect to such possession or transportation *any provision of article 20 of this chapter providing for a time period during which a use tax imposed by such article may be paid on unstamped cigarettes . . . shall not apply.* The possession within this state of more than four hundred cigarettes in unstamped . . . packages by any person other than an agent at any one time shall be presumptive evidence that such cigarettes are subject to tax” (Emphasis added.)

In sum, petitioner has not met his burden to overcome the evidentiary presumptions that (1) the cigarettes in his possession were subject to tax, and (2) the cigarettes in his possession were possessed by him for the purposes of sale.

F. Petitioner’s contention that the unstamped cigarettes seized from him were “the product of an unlawful search” is also rejected (*see, New York v. Farenga, Nastase, Savino*, 42 NY2d 1092, 399 NYS2d 651). Moreover, the Division established by the credible testimony of Investigator Febo, as noted in Finding of Fact “5”, that petitioner consented to the search of his vehicle. Petitioner never stated or suggested otherwise in the course of his own testimony, which was vague and inarticulate. The matter at hand is not a criminal proceeding where the State would have the burden of proof to establish beyond a reasonable doubt that petitioner committed a crime. Rather, the burden of proof in this proceeding was upon petitioner (*see, Matter of Vinter*, Tax Appeals Tribunal, September 27, 2001 [wherein the Tribunal noted explicitly that “It is petitioner’s burden to demonstrate by clear and convincing evidence that the

imposition of the penalty by the Commissioner in the amount so imposed was an abuse of discretion”]).

G. The petition of John H. Davis is denied, and the Notice of Determination dated January 9, 2004 is sustained.

DATED: Troy, New York
July 20, 2006

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE